IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.482 OF 2003

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THE GREAT EASTERN SHIPPING
CO.LTD. ...Petitioner

v/s.

OIL AND NATURAL GAS
CORPORATION LTD. ...Respondent

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Mr.F.D'vitre with Mr.Rahul Narichania, Mr.A.P.Hariani i/b Hariani & Co. for the Petitioner.

Mr.Rajeev Kumar with Mr.Pankaj Sawant i/b Divya Sheth & Associates for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: APRIL,2005

JUDGMENT:

1. By this Petition filed under Section 34 of the Arbitration and Conciliation Act, the Petitioner challenges the award dated 21st July, 2003 passed by the Arbitral Tribunal. The Arbitral Tribunal by that award has rejected the claim made by the Petitioner.

2. The facts that are material and relevant for deciding this petition are:

The disputes between the parties arose out of a contract dated 16th June, 1995 for charter hire of a jack up rig by the Respondent from the Petitioner, who was owner of the rig. The contract between the parties was to commence from 10th April, 1995. The primary term of the contract was for one year i.e. 10th April, 1995 to 9th April, 1996. Admittedly by the second addendum , as permissible under clause

1.3(a) of the contract, the period was further extended for one year from the date and time of the completion of the well in progress. As a result the extended term of contract was to expire on 22-4-1997. However, the Respondent under their letter dated 16-4-1997 in exercise of their option under clause 1.3(c) of the contract had extended the period of the contract by 16 days and 9 hours and that extended term of the contract was to expire on 8th May, 1997. Admittedly, the work of drilling at the location WO-16-5 was completed/abandoned on 28th April, 1997. The contract came to an end admittedly on 8th May, 1997. The claim of the Petitioner before the arbitral tribunal was that the Petitioner is entitled to payment for the period from 29-4-1997 to 8th May, 1997 at the stand by rate, whereas according to the Respondent the Petitioner is entitled to payment at 0 rate.

3. The Respondent by their letter dated 24th April, 1997 informed the Petitioner that the abandonment process of the well on which work was going on was likely to be completed on 28-4-1997. The Respondent, therefore, directed the Petitioner to make arrangement to move the rig to the next location i.e.

B-193-E and to intimate in advance the action plan in case any repair job was to be carried out to the rig before the next movement. The Petitioner by their letter dated 25-4-1997 expressed surprise at the Respondent's letter dated 24-4-1997 and stated that as the Respondent knew that the contract period was to expire on 8-5-1997, they wondered how the Respondent could expect the Petitioner to complete the new well before expiry of the contract. The Petitioner by their letter dated 26th April, 1997 contended that considering that the contract was to expire on 8-5-1997, the direction contained in the letter dated 24-4-1997 was not legally binding on the Petitioner. By letter dated 28-4-1997 the Respondent directed the Petitioner to comply with the direction contained in the letter dated 24-4-1997 and stated that they were entitled to issue that direction as the contract was valid and in existence till 8-5-1997. According to the Petitioner, the work on the existing well was completed by 13:30 hours on 29-4-1997. At that point the Petitioner was under no legitimate orders to move to the next location and therefore it was the duty of the Respondent to remove their men and material and supplies from the rig. According to the Petitioner as the Respondent did not

remove their men and material from the rig, the Petitioner was not in a position to take the rig away and therefore, according to the Petitioner in terms of the contract they were entitled to the stand by charges.

4. According to the Respondent, however, the Petitioner is not entitled to be paid at the stand-by rate. Firstly, according to the Respondent, the Respondent was fully within its right in issuing direction dated 24-4-1997 for the Petitioner to move the rig to the new location. Secondly, according to the Respondent, even assuming that the Respondent was not justified in issuing the direction dated 24-4-1997 for movement of the rig to the next location, then also the Petitioner is not entitled to be paid the stand by charges because considering the state of repairs of the rig the Petitioner was in no position to move the rig to the next location without carrying out repairs and therefore the Petitioner is not entitled to be paid the stand by charges. Thirdly, according to the Respondent, the Petitioner had agreed to the release of the rig under clause 3.5 of the contract and under clause 3.5 of the contract

the Petitioner is entitled to payment only at 0 rate and at no other rate.

5. The Arbitral Tribunal by its award rejected the contention of the Petitioner that the direction contained in the letter dated 24-4-1997 was not legitimate. The Arbitral Tribunal held that as on 24-4-1997 the contract was in force the Respondent was entitled to issue this direction. The Arbitral Tribunal also held that considering the nature of repairs required to the rig, the Petitioner was in no position to move the rig to the next location without carrying out repairs and therefore the Petitioner was not justified in demanding stand by charges. The Arbitral Tribunal has also held that in view of the release of the rig under clause 3.5 of the contract, the Petitioner can be paid only at 0 rate and not at the stand by rate.

6. The learned Counsel appearing for the Petitioner relying on the judgment in the case of Chiswell Shipping Ltd. and Liberian Jaguar Transports Inc. v/s. National Iranian Tanker Co., (1992) Vol.2 Lloyd's Law Reports, 115, the judgment of the Queen's

Bench Division in the case of Shipping Corporation of India Ltd. v/s. NSB Niederelbe Schiffahrtsgesellschaft m.b. H & Co., (1991) Vol. 1 Lloyd's Law Reports, 77, and the judgment in the case of Hyundai Merchant Marine Co. Ltd. v/s. Gesuri Chartering Co.Ltd., (1991) 1 Lloyd's Reports, 100, submitted that the direction contained in the letter dated 24-4-1997 was not legitimate. The learned Counsel for the Petitioner submits that Clause .3(d) deals not with extension, but its opposite premature termination. This too is dependent on the option of the Operator but the Operator's choice in this case is circumscribed by two requirements, firstly, that the termination date must fall within the last 30 days of the Contract Term and secondly, that another well cannot be drilled within the remaining contract period. He further submits that Clause 1.3(b) mandates an automatic extension of the contract period only for the time it would take to complete a well which may happen to be incomplete at the time when the contract period would otherwise expire. It cannot and does not allow a party to the contract to create a situation by its own act by which a well would be made to be in progress on the expiry on the contract period. In other words the automatic

extension under clause 1.3(b) would not apply when the party instructs commencement of a new well, knowing fully well that it would be impossible to complete that well by the schedule date of contract. Otherwise, a party can give such instructions just one day prior to the last date and then claim automatic extension under clause 1.3(b). That is not the object of intent of clause 1.3(b). In fact such acts, if permitted would be an abuse of the contractual term. This is more so since Respondent is an instrumentality of the state.

7. The learned Counsel appearing for the Petitioner, in so far as the finding of the arbitral tribunal that as the rig required repairs it was unable to move to the next location and therefore cannot charge stand by rate is concerned, submits that the rig, though requiring repairs was able to perform drilling operations at the existing well. The rig may be unable to perform drilling operations at a new well, since damage to its legs made the jack-down difficult. The learned Counsel submits that the Respondent relies upon clause 3.5 of the Contract as a defence to the claim. The "Zero rate" stated in clause 3.5 would be applicable when the rig is unable

to perform its "normal intended functions" i.e. functions under the contract with the Respondents. In view of the fact that as on 29th April, 1997 the drilling of the last well was complete and the new well could not have been completed by the expiry of the contract i.e. 8th May, 1997, the instructions to go to the new well were legally and legitimately not complied with by the Petitioner. Thus, the "normal intended functions" under clause 3.5 could only be claimed with reference to the last well (WO 165) completed on 29th April, 1997 and not with reference to the new well location, where the rig could have moved, whether repairs are required or not. The learned Counsel for the Petitioner further submits that the "Zero rate" under clause 3.5 thus may have applied if the rig could not have performed its "normal intended functions" at the new well location, however, that occasion never arose, since the rig was under no legitimate orders after 29th April, 1997 and the contract came to an end on 8th May, 1997. It is thus clear that the conditions of the rig did not affect its performance of the "normal intended functions" as contemplated under clause 3.5. In any case, in any view of the matter, the "zero rate" under clause 3.5 would apply once the rig was

actually released for repairs i.e. from 9th May, 1997. The Petitioner does not claim any charge for this period. The learned Counsel further submits that even according to the Respondent, the rig was capable of working on a new well or moving to a new well, despite damage to its leg (which damage had affected its jack-down operations at new location. He further states that had the Respondent removed its men and materials when asked on 29th April, 1997 itself, the rig could have proceeded for repairs or for new work after repairs. The rig was prevented from doing so, by the Respondent's actions. It is the contention of the learned Counsel for the Petitioner that payment at the non-operating day rates (stand-by rates) must accordingly follow, particularly since Respondent consciously chose not to exercise the option under clause 1.3(d) or not to remove men and material under clause 1.2(a), in either of which event the Respondent could have denied payment to the Petitioner. In these circumstances, the release of rig under clause 3.5 and its acceptance by the Petitioner makes no difference, as what is applicable is not the "zero rate" under clause 3.5, but the non-operating stand by rate under 3.4.2.

8. In so far as point that as the Petitioner accepted release under clause 3.5 of the contract, they can not claim stand by rate is concerned, the learned Counsel for the Petitioner firstly submits that this contention was not raised on behalf of the Respondent before the Arbitral Tribunal. It was submitted by the learned Counsel that this contention also has not been considered by the Arbitral Tribunal, therefore, it cannot be argued here. It was further submitted that when the parties referred to clause 3.5 of the contract in their correspondence, it was not with the intention of applying the Clause with all its facets to the situation, with which they were confronted. It is submitted that the compromise between the parties was not founded on clause 3.5 of the Contract.

9. The learned Counsel further submits that the compromise contemplated that the rig would not return to its work under the Contract after the completion of repairs. This was palpably contrary to the whole scheme of Clause 3.5, in which the process of stop work- repair- resume work is plainly continuous and contemplates no hiatus. A scheme in which the rig

was to be employed on a wholly new employment, to be re-employed at a future date would not come under Clause 3.5. The compromise scheme allowed the Respondent the option to call for the rig to be re-deployed, an option it might well forego if market rates dropped in the meantime. Clause 3.5 contemplated no such option. Clause 3.5 provided for the cost of re-deployment (to the extent of 7 days) to be borne by the Respondent. Under the compromise scheme the entire cost of redeployment was to be borne by the Petitioner. Under the compromise, the work taken up after the repairs would extend till the completion of one well, and that well alone, and no further. In contrast, when work restarted under Clause 3.5 all possible extensions to the contract period (under clause 1.3) would have been preserved.

10. The first submission of the learned Counsel appearing for the Respondent is that the view that has been taken by the learned Arbitral Tribunal of the correspondence on record and the terms of the contract between the parties is a possible view and therefore this court should not interfere with the finding recorded by the Arbitral Tribunal. It is submitted on behalf of the Respondent that on

24-4-1997 the contract was in force and therefore the Respondent was within its right in issuing direction to the Petitioner to move to the next location. The learned Counsel submits that the judgments on which reliance is placed on behalf of the Petitioner before this Court were relied on before the arbitral tribunal also and the arbitral tribunal has correctly distinguished those judgments. It is next submitted on behalf of the Respondent that it was known to the Petitioner that the repairs were required to rig right from 1996. The Petitioner was fully aware that they were in no position to start the work at the new location considering the condition of the repairs of the rig. The Respondent also had repeatedly asked them whether they want to proceed to the repairs of the rig, but the Petitioner took unreasonable stand from time to time. It is submitted that even if it is assumed that the order of the Respondent to the Petitioner to move to the next well was not valid or legitimate, then also the Petitioner cannot claim payment of stand by charges, because their rig was in no position to move either to next location or to any location for doing the work without the repairs being carried out. It is submitted that the payment at stand by rate is contemplated when the rig is in a

position to take up next work. If the rig was not in a position to take up the next work, then there is no question of the Respondent paying stand by charges to the Petitioner. It is next submitted that the Arbitral Tribunal has clearly considered the aspect of release of the rig by consent of the parties under clause 3.5 of the contract and therefore the Arbitral Tribunal has held that in view of the recitals in clause 3.5 of the contract between the parties, the Petitioner is not entitled to claim stand by charges.

11. Now, in the light of these rival submissions , if the award is perused, it shows that the Arbitral Tribunal has considered every aspect of the matter in detail and has given reasons in detail for each and every finding that it has recorded. So far as the first aspect of the matter is concerned, namely whether the direction contained in the letter dated 24-4-1997 directing the Petitioner to move to the next location was valid or invalid is concerned, in my opinion, considering the judgments on which the reliance has been placed on behalf of the Petitioner it is possible to take a different view and hold that in such a situation when there was no possibility of the next well being completed within the period of

the contract, the Respondent was not justified in issuing the direction. But in my opinion, it can be said that the view that has been taken by the Arbitral Tribunal that because the contract was current and existing, the Respondent was within its right in issuing the direction, is also a possible view and therefore considering the limited jurisdiction of this Court under Section 34 of the Arbitration Act to disturb the award made by the Arbitral Tribunal, it will not be appropriate on my part to interfere with the finding.

12. So far as the next question namely as the Petitioner was in no position to take up the next assignment considering the condition of the rig is concerned, in my opinion, it is also a possible finding to be reached on the basis of the material on record. Perusal of the award shows that the Arbitral Tribunal has taken into consideration every relevant term of the contract and the correspondence between the parties and has recorded findings. It was not even the complaint of the learned Counsel appearing for the Petitioner that any relevant terms of the contract or any relevant letter on record has been

excluded from consideration by the Arbitral Tribunal. Therefore, if the Arbitral Tribunal after taking into consideration all the relevant terms of the contract and the relevant correspondence between the parties has taken a particular view after giving detail reasons for doing so, in my opinion, it will not be appropriate for me to disturb that finding.

13. In my opinion, the claim made by the Petitioner was really a dishonest claim. They themselves had agreed for release of the rig under clause 3.5 and perusal of clause 3.5 shows that the Petitioner can not claim payment of stand-by charges. The contention of the learned Counsel for the Petitioner that this aspect of the matter was not raised before the arbitral tribunal and has not been decided by the arbitral tribunal is not correct. Following observations from the award, in my opinion, clearly show to the contrary:

> "Firstly the correspondence shows that it was not the first time that in the Respondents letter dated 4-5-1997 the release of the rig directed to be under

> Cl.3.5 for repairs to spud-cans of the rig, was mentioned or contemplated. In fact the Claimants themselves, in their letter as far back as 22nd October 1996 (Respondents' compilation p.100) had informed the Respondents that they would require 7 days to carry out repairs to the rig's spud cans during incoming rig move and therefore as provided in Cl.3.5 of the contract they would accept the day rate for the rig at Zero rate for the period of repairs. When the claimants had themselves by their said letter agreed to accept the day rate for the rig at zero rate during the period of repairs, it is difficult to see how they now can contend to the contrary only on an irrelevant ground that nothing was required of the rig under the contract.'

The learned Arbitral Tribunal has further observed in its award thus:

> "In our view in this case, the release of

> the rig being under Cl.3.5 of the contract, the Day Rate for the rig during the period of seven days of repairs would be a "Zero Rate" and the Claimants would not be entitled to claim hire for the said period at ‘stand by rate’."

These observations of the Arbitral Tribunal quoted above clearly show that this aspect of the matter was duly considered by the Arbitral Tribunal.

14. So far as the aspect of requirement of repairs to the rig is concerned, by letter dated 22nd October, 1996 the Petitioner had informed that they would need five to seven days to complete the repair to the rig during the upcoming rig move and therefore, they will accept the dayrate for rig move at "zero rate" for the period of the repair in terms of clause 3.5 of the contract. By letter dated 7-2-1997, again the Petitioner informed that the repair to the leg of the rig would be carried out before the rig is installed at the next location. Same thing was repeated in the letter dated 8-2-1997. When by letter dated 24-4-1997 the

Respondent directed the Petitioner to move to the next location, in that letter itself the Respondent had stated that if any repairs are required to the rig, action plan should be forwarded by the Petitioner to the Respondent. In their reply dated 25-4-1997 the Petitioner did express their surprise at the direction contained in the letter dated 24-4-1997, but did not refer to any repairs to the rig. In the letter dated 26-4-1997 without prejudice offer made by the Petitioner is contained, and that offer contemplates the men and material on the rig being removed latest by 1st May, 1997, to enable the rig to proceed to the East Coast for repairs. Then in the letter dated 1st May, 1997 the Petitioner stated thus:

> "Further more, even were we to bow to your illegitimate direction, it would be impossible for the rig in her present condition to comply with your drilling program. As you are fully aware, the rig has suffered damage in the area of the connection between her leg chord and the spud can. The Classification Society has

requested us to complete the repairs during the next rig move and in any case by the 10th June, 1997. In view of the approaching monsoon, the repairs cannot be effected in time. This rules out the commencement of drilling program at the new site in any event till the monsoons are over."

15. It is, thus, clear that it was an admitted position between the parties that the rig was in no position to move and take up the job at the next location without carrying out the repairs. Next day the Petitioner sent a letter dated 2nd May, 1997 to ABS Pacific Bombay, where the Petitioner referred to the request of the Respondent to move to the next location. It was stated that drilling operation at the new site will take about two months to complete. Now, comparison of this letter of the Petitioner to ABS Pacific Bombay and the letter dated 1st May, 1997 to the Respondent shows that contradictory stands have been taken by the Petitioner. It appears that the ABS Pacific, Mumbai by their letter

dated 2nd May, 1997 stated that they would not allow the work on the new location being commenced without the repairs. In this background, the Respondent sent a letter dated 4-5-1997 to the Petitioner. In first paragraph of that letter the Respondent stated thus:

> "In continuation to past correspondences exchanged regarding release of subject rig and your latest letter Nos.926/97 dtd. 3-5-1997 and 929/27 dtd.3-5-1997, please be informed that ONGC does not have any objection for getting your rig repaired (spud can repairing) as per clause No.3.5 of the contract, already conveyed to you vide our fax Message dtd.2-5-1997."

The Respondent, thus, clearly offered to release the rig under clause 3.5 of the contract. The letter dated 4-5-1997 was replied to by the Petitioner next day ie. 5-5-1997 and stated thus:

Reference may please be made to your fax message No.BRBC/DBG/SP/Rigs(CH)/65/94 dated 4th of May 1997. We are thankful to you for authorising release of the rig under contract clause 3.5. With reference to your said letter we would like to clarify that as mentioned in our letter Ref.926/97 of 3rd May, 1997, the team for supervising repair is expected to arrive from Houston not earlier than 1st of June, 97. We had duly taken up with them regarding possibility of mobilising the team earlier but they have not been able to do so. After the arrival of the team the repair activities will be completed in two weeks' time, say by middle of June, 1997.

You will appreciate that it would not be practicable to mobilise the rig to B-193-E location immediately after this repair. Even otherwise the contract period would be over by that time. Notwithstanding that and keeping in view the interest of both

ONGC and GESCO and the past good relations, it is reconfirmed that we would be willing to deploy this rig if so required by ONGC (at its option) around the month January 1998 for drilling only one well at B-193-E location or any other one exploratory well of equal target well depth of 2300 meters plus/minus Ten percent, at any location in west coast of India as identified by ONGC and complete the said one well on the terms and conditions, as provided in the Contract No.BRBC/DBG/SP/Rigs(CH)/65/94 signed on 16th June, 1995 between ONGC and GESCO and the rate(s) to be governed by the second addendum dated 25th March 1996. We also reconfirm that we will mobilise to such location at our own cost and after completion of such well, ONGC will not be required to pay any mobilisation charges. The existing Performance Bond is already valid upto 31-7-1997 and we agree to extend the same for a period till 2 months beyond the completion of the proposed one well.

Meanwhile, we are arranging to extend the

> Performance Bond till March, 98 which would be extended as required.

It is thus clear that not only that the Petitioner accepted the offer of the release of the rig under clause 3.5, but they also agreed to come back for drilling one well after the repairs to the rig. I have been told, at the bar, that accordingly after the repairs and after the monsoon was over, the Petitioner's rig came back and drilled one well for the Respondent. It is , thus, clear from this letter dated 5th May, 1997 that the contract between the parties was for release of the rig under clause 3.5. The Respondent responded to the letter dated 5-5-1997 next day by their letter dated 6-5-1997. First paragraph of that letter reads as under:-

> "We hereby agree to release your Rig Kedarnath under Clause 3.5 of the Contract and in accordance with the explanation made by you in your letter No.GESCO/SKS/97 dated 5th May, 1997."

16. It is thus clear that the rig was released under Clause 3.5 and the Petitioner also agreed to come back for drilling one well. Therefore, now, it becomes necessary to refer to clause 3.5. Clause 3.5 reads as under:-

> 3.5 Hull Inspection
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> Contractor shall be required to carry out repair of damage or structural defects in the hull structure and/or to carry out required inspections, which prevent the hull structure from performing its normal intended functions. Contractor shall be required to effect said repairs, inspections or modifications required as a result of said inspection at its cost and zero rate and Operator shall provide diesel, water and other services at its cost for a maximum period of seven days, provided the said inspection/repairs are carried out at old drilling location or new

drilling location or en-route to new location, thereafter, the cost of diesel, water and other services shall be borne by Contractor. Contractor shall bear all costs towards diesel, water and other services, in case the inspection/repairs are carried out at a location other than as specified above. The term ‘Hull" for the purpose of this clause would include legs and spud cans.

Zero rate shall commence from the time, when the Drilling Unit cannot perform its normal intended functions, ending with the Drilling Unit is positioned over the next location, duly jacked up and ready to spud the well, except that, if the Drilling Unit, after said inspections/repairs, commences operations, as per Contract at the next location, directly, as if it is movement between two locations, in accordance with Article 3.4.3- Moving Rate. However, in the event, Drilling Unit commences operations at the same location prior to moving the Drilling Unit for said

inspections/repairs, no rate whatsoever shall be payable to the Contractor.

For calculation of Moving Rate for positioning at new location in case of a situation mentioned above, the average speed of Drilling Unit, during previous interlocation movement shall be considered. However, if there is no previous interlocation movement, then the average speed of Drilling Unit for movement of Drilling Unit from previous location to repair/inspection site and back to the location, as mentioned above, shall be considered.

If drilling operations at a location are over and only hull inspection/repair etc. as mentioned above is carried out then the time taken in jacking down at the said location and the time taken in jacking up at the next location shall be allowed at Non-operating Rate.

Operator, if required, shall off-load/load,

from/on, Drilling Unit, Operator's or its third party's equipment, at mutually agreed place and time at the cost of Contractor without any financial liability to Operator including payment of any day rate.

Primary Term of this Contract or any extension thereof shall be extended as per Article 1.3(c) by a period equal to the time the Drilling Unit was off-duty but not to exceed thirty (30) days. Operator may provide boats subject to availability for towing of Drilling Unit for hull inspection in Indian waters at Contractor's cost.

The Operator may provide Diving services essential for Drilling operations only. Search of Contractor's equipment will be at Contractor's cost. However, Operator shall provide diving services as may be available with the Operator, to the Contractor at the Contractor's cost, subject to exigencies of operations.

17. It is clear that when the parties agreed that the release of the rig would by under Clause 3.5, it is obvious that the release will be governed by the terms of clause 3.5 quoted above. So far as aspect of entitlement of the Petitioner for payment is concerned, perusal of clause 3.5 quoted above shows that so far as the aspect of payment is concerned, this clause mentions three types of rates (i) "Zero rate"; (ii) Moving rate; and (iii) non-operating rate; "Zero" rate, according to clause 3.5 commences from the time, when the Drilling Unit cannot perform its normal intended functions, ending with the Drilling Unit is positioned over the next location. So far as "moving rate" is concerned, it becomes payable after completion of the repairs to cover the time taken from the place where the repairs are carried out to the new location, and so far as "non-operating" rate is concerned, that according to clause 3.5 is payable for the time that is taken by the rig in jacking down at the old location and jacking up at the new location. It is, thus, clear that of the three rates that are mentioned in clause 3.5, moving rate and non-operating rate are clearly not applicable, that leaves only "zero rate", and therefore, it is only

"zero" rate which will govern the present situation. Having agreed to the release of the rig under Clause 3.5, the Petitioner now cannot be heard to say that though the release was under Clause 3.5, they are entitled to payment according to clause 3.4.4. In my opinion, the letters of the Petitioner quoted above estop the Petitioner from claiming stand-by rate under Clause 3.4.4. Having accepted the release of the rig under Clause 3.5, the Petitioner is estopped from claiming payment under any other clause of the Contract.

18. For all these reasons, I do not find that there is any justification for setting aside the award made by the Arbitral Tribunal.

19. In the result, therefore, the Petition fails and is dismissed. The Petitioner is directed to pay costs of this petition to the Respondent, as incurred by the Respondent.

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